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No.

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

ROBERT G. BORG, WARDEN,

Petitioner,

v.

ALLEN R. TURK,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DANIEL E. LUNGREN, Attorney General
of the State of California

GEORGE WILLIAMSON
Chief Assistant Attorney General

RONALD A. BASS
Senior Assistant Attorney General

GERALD A. ENGLER
Deputy Attorney General

MORRIS BEATUS
Deputy Attorney General
[Counsel of Record]

455 Golden Gate Avenue, Room 6200
San Francisco, California 94102-3658
Telephone: (415) 703-2838

Attorneys for Petitioner

QUESTIONS PRESENTED

Does the Ninth Circuit's rule that a state court's competency determination is subject to de novo review on federal habeas corpus conflict with the decision of this Court in *Maggio v. Fulford* and the decisions of other Courts of Appeal that competency determinations are entitled to a presumption of correctness?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, filed on May 5, 1993 with rehearing denied and rehearing on banc denied on June 24, 1993.

OPINIONS BELOW

A copy of the unpublished opinion of the United States Court of Appeals for the Ninth Circuit is attached to this petition as Appendix A. A copy of the unpublished order denying rehearing and rejecting rehearing en banc is attached as Appendix B. A copy of the unpublished order of the District Court denying the petition for writ of habeas corpus appears as Appendix C. The unpublished decision and orders of the state courts are attached as Appendices D through G.

JURISDICTION

The Judgment of the Court of Appeals for the Ninth Circuit was entered on May 5, 1993. Rehearing was denied and rehearing en banc rejected on June 24, 1993. This petition for writ of certiorari followed within 90 days. 28 U.S.C. § 2101(c); Supreme Court Rule 13.1, 13.4. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

FEDERAL STATUTES INVOLVED

Title 28, section 2254(d) provides in pertinent part:

> In any proceeding instituted in a Federal curt by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit:
>
> * * *
>
> (8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported

by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

STATEMENT OF THE CASE

A. State Proceedings

On November 10, 1980, an information was filed by the Alameda County District Attorney charging respondent with murder. CT 1-3.[1/] After twenty court days of trial, a jury returned a verdict of first degree murder with use of a deadly weapon. The trial court reduced the finding to second degree murder and imposed an aggregate sentence of 19 years to life. CT 37, 44-45.

Petitioner unsuccessfully appealed to the California Court of Appeal, which affirmed the conviction in an unpublished opinion on April 20, 1984. Appendix D.

Petitioner initiated state collateral proceedings on March 24, 1988, in the state trial court, claiming that he had submitted substantial evidence during trial about his competency and that the trial judge abused his discretion in failing to order a competency hearing pursuant Cal. Penal Code § 1368. The superior court denied habeas corpus relief by order on May 2, 1988, finding that respondent made no prima facie showing to support relief. Appendix E. Respondent's subsequent habeas corpus petitions to the state court of appeal and state supreme court (in which he also claimed that his appellate counsel was ineffective for failing to raise the competency issue on

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1. "CT" refers to the Clerk's Transcript of state trial proceedings lodged in the District Court with the Answer.

direct appeal) were summarily denied. Appendices F and G.

B. Federal Proceedings

Respondent sought federal habeas corpus relief under 28 U.S.C. § 2254. On February 27, 1992, the District Court denied relief, finding on the basis of "fairly supported factual conclusions" that the state trial court correctly decided no substantial evidence existed to warrant reasonable doubt about respondent's competency to stand trial. Appendix C at 35. The ineffectiveness claim was also rejected. *Id.*

On appeal to the Ninth Circuit, a divided panel reversed the District Court's judgment and ordered respondent's state conviction for murder vacated. Appendix A at 28. In doing so, the majority applied a de novo standard of review to the state trial judge's finding of competency and concluded that a reasonable judge should have experienced doubt with respect to respondent's competency to stand trial. *Id.* at 25 ("'On appeal, we inquire "whether a reasonable judge . . . should have experienced doubt with respect to competency to stand trial."' [Citations] The test is not whether the trial judge did in fact experience doubt, but whether he or she *should* have experienced doubt.").

Notwithstanding the dissent's insistence that the precedential authority of this Court commanded a deferential standard of review, Appendix A at 29, the majority refused to discuss or mention *Maggio v. Fulford*, 462 U.S. 111, 117 (1983), which held that state court determinations of competency are entitled to a

presumption of correctness under 28 U.S.C. § 2254(d). Rehearing and rehearing en banc were denied. Appendix B.

C. Statement of Facts

The facts underlying respondent's conviction for murder are undisputed and were succinctly recited in the state appellate court's 1984 opinion affirming the judgment: "Juanita Whitaker died as a result of severe head injuries; her body was found near appellant's truck. [Turk] told at least two acquaintances that he had beaten a woman and thought he killed her." Appendix D at 37.

Respondent's constitutional attack centered on the events occurring midway through trial, which began on August 12, 1981. On August 24, the prosecution had presented its case and rested. CT 21. The defense case began the next morning. CT 22; 2 RT 229-64.[2/] According to defense counsel's earlier opening statement, the defense intended to show drug use and mental illness that mitigated the crime to manslaughter. RT (8/19/81) 338-44.[3/] By the afternoon of August 25, however, the defense attorneys were informing the trial judge that respondent had just told them that he no longer wanted any psychologist to testify and that he wanted to testify himself, and in particular testify about his religious views. 2 RT 265-66. Counsel thought that a competency

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2. "RT" refers to the Reporter's Transcript of trial proceedings lodged in the District Court with the Answer.

3. The opening statement is contained in the Reporter's Transcript volume of jury voir dire.

examination under Cal. Penal Code § 1368 was in order. 2 RT 266.[4]

The trial judge disagreed, commenting: "On the basis of what I have observed, him sitting here, observing the defendant, observing him while witnesses were testifying, observing him, while I didn't hear what he was saying to you, observing him in conversation with you, looking at him, I feel that he is able to cooperate with his defense." *Id.* The court then questioned respondent as follows:

> The Court: Let me ask your client certain questions. I wouldn't ask him about this case. I wouldn't ask him the facts of the case.
> Mr. Turk, do you know what you are on trial for?

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4. Under state law, competency to stand trial requires that a defendant be able to understand the nature and purpose of the proceedings taken against him and to conduct his own defense in a rational manner. *People v. Pennington*, 66 Cal.2d 508, 515; 58 Cal.Rptr. 374, 379, 426 P.2d 942, 947 (1967). A competency hearing is necessary if the trial judge entertains a bona fide doubt raised by substantial evidence of present mental incompetence. *Id.* at 517-18, 58 Cal.Rptr. at 379-81, 426 P.2d at 947-49.

Cal. Penal Code § 1368 provides for the suspension of criminal proceedings when a doubt arises in the mind of the trial judge about the competency of a defendant. Once proceedings are suspended a court or jury trial to determine competency follows. Cal. Penal Code § 1369. If the defendant is found mentally competent, the criminal process resumes, the trial proceeds, and the judgment may be pronounced. If, on the other hand, the defendant is found mentally incompetent, the trial or judgment must be suspended until the person regains his mental competence. Cal. Penal Code § 1370.

> The Defendant: Yes, I do.
> The Court: What?
> The Defendant: Murder, 187 of the Penal Code.
> The Court: You understand what has been going on in court?
> I am not saying you necessarily agree or agree with what has been said. Have you listened to the witnesses?
> The Defendant: I heard them.
> The Court: You have heard what they said?
> The Defendant: I heard what they said.
> The Court: Do you feel you are capable of going on with this trial?
> The Defendant: Sure. I can go on with it.

2 RT 266-67.

Defense counsel, in response to the court's question about the basis of his competency concern, stated that respondent had delusions of a "religious nature." 2 RT 267. Respondent would not allow counsel to call psychologists to establish a mental defense, a decision which in counsel's view was not rational. 2 RT 268. Turning to respondent, the court advised him that he had competent counsel and asked whether he wished to say anything. Respondent replied: "Well, I just, you know, I'd rather go to trial as it is right now without anyone coming, any expert witness. What I didn't want was N.G.I., the defense for diminished capacity. I don't want to deal with that." 2 RT 269. Further questioning from the court showed that respondent understood the purpose

of the diminished capacity defense and recognized that he had "lawyers of experience and understanding." 2 RT 269-70. The court then acceded to respondent's previous desire to have a Black psychiatrist, Dr. Joseph Davis, appointed to examine him that evening. 2 RT 270-71.[5/] Concluding the afternoon session, the court reaffirmed its view that a § 1368 hearing was inappropriate:

> And as I listen to him, I honestly feel that he is competent to proceed with this trial. I have no doubt about it. I mean, he may have, for example, what you call a psychotic episode, may fade in and psychotic episode, fade in and out. I am not a psychiatrist and I'm not a psychologist. However, I would say for four years I presided over the psychiatric court in San Francisco, the commitment court, five days a week, four years. That was in San Francisco.
> I had something to do with the writing of the Lanterman-Petris-Short Act. I had a great deal to do with it. I testified before the Legislature. I am not an oracle, of course not.
>
> But as I talked to the defendant, I feel that he has the ability to proceed and 1368 would

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5. Dr. Davis later testified at trial that respondent exhibited no inappropriate behavior or disorganized thought during the mental examination, and that a schizophrenic illness, which Dr. Davis diagnosed, was in remission. 4 RT 225, 229, 282.

be highly inappropriate.

2 RT 271.

The court also noted that in determining respondent to be competent it took into account the reports of two alienists, Drs. Gudiksen and Burstein, who had examined respondent under appointment from the court. 2 RT 272.[6/]

The following morning, defense counsel renewed the motion to suspend proceedings under § 1368. Counsel reported that respondent had spoken the previous Saturday to Dr. Bastian, a psychologist, who considered him

> psychotic at the time she was interviewing him. She saw him again this morning. She says the same thing. I make the motion under 1368 because I don't believe Mr. Turk at this point is capable of cooperating with counsel. He does not know the difference between legal guilt and moral or spiritual guilt. And, therefore, not knowing that distinction, he refuses to allow us to proceed to present psychological evidence in his defense. And he also will not accede to our advice that he testify. He says he wants to withdraw his plea of not guilty by reason of

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6. Both Drs. Gudiksen and Burstein later testified at trial that they found no basis for a mental defense. 5 RT 39-41, 169, 174-75.

> insanity; wants to withdraw his defenses under diminished capacity, wants to proceed without those defenses. As a lawyer, I can't competently represent the man, given his state of mind where he fails to know the difference between legal guilt and spiritual guilt. Therefore, I consider him a 1368, your honor. And that is why I make the motion.

2 RT 278-279.

The court questioned whether the sudden finding by Dr. Bastian that respondent was incompetent resulted only "because he wouldn't let [counsel] present the kind of defense that [counsel] would like to present []." 2 RT 279.

During further discussion, respondent expressed the desire to relieve his present attorneys because of their disagreement with him over the mental defense. 2 RT 281. Respondent explained that he had never agreed to the defense and was perfectly willing to accept the consequences of forgoing it. 2 RT 282. He also recognized that he would have to live with the decision and was emphatic on the subject. 2 RT 283-284, 291-292. "I want to go straight into this trial as it is. I want to withdraw the plea of not guilty by reason of insanity, N.G.I., and I don't want the matter of diminished capacity." 2 RT 284.

The court declined to relieve counsel. It reiterated that it was "fairly firmly convinced there is no 1368. None whatsoever. None." 2 RT 292. Concluding on the issue of competency, the court stated:

> I deny the motion to suspend the proceedings. I do it on the basis of my [sic] statement you made about what the psychologist said, about the report that I have in the file from Gudiksen & Burnstein, from my observations of the defendant, mere statement that he may be, and you are distinguishing between legal guilt and religious guilt. He is competent to stand trial and cooperate with counsel.

2 RT 294.

The trial proceeded, with respondent's mental state nonetheless prominently in issue.

REASONS FOR GRANTING THE WRIT

In direct conflict with the decisions of this Court, the Ninth Circuit has ruled that a federal habeas court may vacate a state judgment and compel a new trial by independently deciding that a state trial judge should have entertained a bona fide doubt about a criminal defendant's competency to stand trial, even if the trial judge's express determination of competency finds support in the record. The Ninth Circuit has ignored the application of 28 U.S.C. § 2254(d)(8) and the existence of *Maggio v. Fulford*, 462 U.S. 111, 117 (1983), in which this Court required federal habeas courts to accord a presumption of correctness, if fairly supported by the record, to a state court's factual finding that no competency hearing is required. *See also Demosthenes* v. *Baal*, 495 U.S. 731, 735 (1990) (state court's conclusion regarding a defendant's competency is entitled to presumption of correctness); *Miller v. Fenton*, 474 U.S. 110, 113, 116-17 (1985) (distinguishing presumption of correctness applicable to finding of competency from de novo standard of review applicable to finding of voluntariness).

The Ninth Circuit has also silently disavowed its own earlier decision in *Evans v. Raines*, 800 F.2d 884, 886-87 (9th Cir. 1986), correctly applying *Maggio*, and repudiated with the same silence the decisions of the other United States Courts of Appeal which have held, in light of *Maggio*, that a state court's finding as to a defendant's competency to stand trial is presumed correct. *See Balfour v. Haws*, 892 F.2d 556, 560 (7th Cir. 1989) (state court's finding of no *bona fide* doubt as to

competency entitled to presumption of correctness); *Lafferty v. Cook*, 949 F.2d 1546, 1550, 1555 (10th Cir. 1991), *cert. denied*, 112 S.Ct. 1942 (1992) (state finding presumptively correct if correct legal standard of competency applied); *Price v. Wainwright*, 759 F.2d 1549, 1552 (11th Cir. 1985) (same); *Davis v. Wyrick*, 766 F.2d 1197, 1201 (8th Cir. 1985) (competency to stand trial is issue of fact); *Patterson v. Cuyler*, 729 F.2d 925, 931 (3d Cir. 1984) ("inescapable conclusion" of *Maggio* is that competency is question of fact even if ultimate issue characterized as a mixed question of law and fact).[7]

The Ninth Circuit's opinion makes nugatory every state judge's finding of competency, insofar as the finding rests on the trial judge's personal and contemporaneous observation of the defendant in open court and any credibility determinations relating to the issue. Yet, this Court has held that assessments of credibility and demeanor are crucial to the proper resolution of competency to stand trial, *see Miller v. Fenton*, 474 U.S. at 116-17, and that the adjudication of competency to stand trial in open court on a full record serves as a further guarantee of the reliability and integrity of the

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7. In dictum placed in footnotes, two appellate courts have indicated that the determination of competency is a mixed question of law and fact limiting the application of a presumption of correctness under 28 U.S.C. § 2254(d)(8). *Bouchillon v. Collins*, 907 F.2d 589, 593 n. 11 (5th Cir. 1990); *James v. Singletary*, 957 F.2d 1562, 1574 n. 18 (11th Cir. 1992). Neither case cites or discusses *Maggio*. The dictum is irreconcilable with this Court's analysis in *Miller v. Fenton*, 474 U.S. at 116-117, distinguishing the presumption of correctness accorded competency determinations from the de novo review required of the mixed fact/law question of voluntariness.

state fact-finding process on the issue. *Id.* at 117.

The Ninth Circuit's refusal to yield to, let alone discuss, this Court's dispositive decisions undermines the judicial process and deprives states within the Ninth Circuit of the uniform application of constitutional law. Substantively, the Ninth Circuit's rule invites retrospective, de novo redetermination by federal judges of factual matters already resolved by "one judicial actor better positioned than another to decide the issue." *Id.* at 114. In the Ninth Circuit, state prisoners are now free to challenge presumptively valid judgments on the grounds that a state trial judge's personal and contemporaneous assessment of their mental state is entitled to no deference in federal court. State judgments in the Ninth Circuit now rise or fall on a federal judge's independent review of previously determined facts from a cold and dated state record. The process strikes at the heart of finality and comity, considerations of which this Court has placed at the forefront of recent decisions determining the proper scope of federal habeas review. *See Teague v. Lane*, 489 U.S. 288, 308 (1989); *McClesky v. Zant*, __ U.S. __, 111 S.Ct. 1454, 1474 (1991); *Coleman v. Thompson*, __ U.S. __, 111 S.Ct. 2546, 2565 (1991).

The Ninth Circuit has again adopted a rule peculiar to itself and at odds with the decisions of this Court and the views of other Courts of Appeal.[8/] It imposes on the

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8. The Ninth Circuit's inclination to chart its own course is reflected in two recent cases before this Court. *See Godinez v. Moran*, __ U.S. __, 61 U.S.L.W. 4749, 4750-51, n. 5 (1993) (only Ninth Circuit applies "reasoned choice" standard to waivers of counsel); *United States v. Padilla*, __ U.S.__, 113 S.Ct. 1936, 1938 (1993) ("The Ninth Circuit appears to stand alone in embracing the

states of this circuit a rule which is at best unpredictably and haphazardly applied, and in all circumstances a rule which is plainly in conflict with federal jurisprudence. Certiorari should be granted so that the Ninth Circuit receives unequivocal guidance on the applicable standard for review of a state trial court's competency determination.

'coconspirator exception' [to the rule regarding who may challenge the constitutionality of a search or seizure]"). This Court reversed the Ninth Circuit in both cases.

ARGUMENT

Twelve years ago, the state trial court in this case expressly determined that it had no reasonable doubt about respondent's competency to stand trial after observing him during a lengthy murder trial, questioning him on his understanding and awareness of the proceedings, and relying on the reports of two court-appointed alienists (a psychiatrist and a psychologist), who contemporaneously examined petitioner and found no basis for a mental defense.

The Ninth Circuit accorded no deference to this factual finding. The failure is unexplained. Nor did the majority of the panel which rendered the opinion mention 28 U.S.C. § 2254(d)(8), which imposes a presumption of correctness for a state court factual finding fairly supported by the record. Also omitted was any reference to this Court's decision in *Maggio v. Fulford,* 462 U.S. 111, which held that a trial judge's determination about the necessity of a competency hearing raises a factual conclusion to be reviewed under the deferential standard of § 2254(d), *id.* at 116-17, and that "[b]efore a federal habeas court undertakes to overturn factual conclusions made by a state court, it must determine that these conclusions are not 'fairly supported by the record.'" *Id.* at 117. Further, the Ninth Circuit's opinion contained no acknowledgment that its own circuit case law and the decisions of the other Courts of Appeal interpreting *Maggio* require a federal habeas court to accord a presumption of correctness to a state court's determination of competency to stand trial. *Evans v. Raines*, 800 F.2d at 887; *Balfour v. Haws*, 892 F.2d at 560;

Lafferty v. Cook, 949 F.2d at 1550, 1555; *Price v. Wainwright*, 759 F.2d at, 1552; *Davis v. Wyrick*, 766 F.2d at 1201; *Patterson v. Cuyler*, 729 F.2d 925 at 931.

In the opinion itself, the Ninth Circuit did not question the trial court's application of the appropriate legal standard in making its finding of comptency, or deny the existence of support in the record for the trial court's finding. The Ninth Circuit opinion noted only that the "evidence" in support of the trial court's finding "did not, however, erase the doubt that the other evidence had created about petitioner's competence to stand trial." Appendix A at 27.

The Ninth Circuit's opinion presupposed that "the other evidence" -- the opinions of respondent's trial counsel and the defense expert, Dr. Bastian -- was credible. However, it is precisely this kind of evidence which the trial court is under no obligation to credit. *Maggio v. Fulford*, 462 U.S. at 117-18. The Ninth Circuit failed to appreciate that any evidence supporting a bona fide doubt of competency must be credible and that it is the trial court which makes the determination of credibility. Evidence whose credibility the trier of fact rejects cannot create a bona fide doubt. *See id.* at 119-20 (White, J., concurring). Credible evidence supported a finding of competency in this case, as the dissent below noted without contradiction. Appendix A at 30-31.

Without any discussion of this Court's controlling precedent or the decisions of other Courts of Appeal, the Ninth Circuit purported to base its de novo review of the trial court's competency finding on two recent circuit opinions. The cases in question are *Hernandez v. Ylst*, 930 F.2d 714, 716 (9th Cir. 1991), and *United States v.*

Lewis, 991 F.2d 524 (9th Cir. 1993).[9] The Ninth Circuit opinion cited them for the proposition that the standard of review on the issue of competency requires an objective inquiry about whether a reasonable judge should have experienced doubt with respect to competency to stand trial. Appendix A at 25.

Both *Hernandez* and *Lewis* fail to cite or discuss *Maggio*. Neither is sound authority for a view at odds with *Maggio's* clear statement that a deferential standard is not only appropriate but congressionally compelled under 28 U.S.C. 2254(d)(8), if the trial court's finding of competency is fairly supported by the record. *See Maggio v. Fulford*, 462 U.S. at 113, 117.

These cases are at odds even with other recent decisions of the Ninth Circuit, which apparently maintains two published and conflicting standards for reviewing a state court's determination of competency to stand trial. The Ninth Circuit's most recent published pronouncements on the subject, none of which is cited in the present opinion, offer no predictability on future rulings. In *Brewer v. Lewis*, 989 F.2d 1021, 1027 (9th Cir. 1993), the Court of Appeals cited *Maggio* and stated that it was obligated to accord presumption of correctness to the state court's determination of competency to plead guilty. Months earlier, however, a different panel of the Ninth Circuit questioned but did not decide whether the presumption of correctness under 28 U.S.C. § 2254(d)

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9. *United States v. Lewis* also applied the "reasoned choice" standard for determining competency to plead guilty, a standard which this Court recently rejected in *Godinez v. Moran*, 61 U.S.L.W. at 4751.

extended to a court's finding of competency to waive a constitutional right. *Moran v. Godinez*, 972 F.2d 263, 266 & n. 6 (9th Cir. 1992), *reversed, Godinez v. Moran*, __ U.S. __, 61 U.S.L.W. 4749 (1993).[10/] Added to this mix are *United States v. Lewis* and *Hernandez v. Ylst*, cases standing for the proposition that the Ninth Circuit accords no presumption of correctness to a state court finding of competency. *See* Appendix A at 25.

In the present case, the Ninth Circuit has unequivocally applied the wrong standard without apparent consideration of the conflicting precedent of this Court, the circuit's own inconsistent opinions, or the decisions of other Courts of Appeal. The result cannot be reconciled with principled decision-making and the uniform application of the law. Certiorari is essential to resolve the conflict and to give the states of the Ninth Circuit the benefit of decision-making tethered to this Court's jurisprudence.

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10. In reversing *Godinez*, which involved whether the standard of competency to plead was higher than the standard of competency to stand trial, this Court had no occasion to address the application of 28 U.S.C. § 2254(d) to competency determinations. The Ninth Circuit had found the presumption of correctness irrelevant in light of its erroneous conclusion that the state court applied the wrong legal standard in making its finding. *See Godinez v. Moran*, 61 U.S.L.W at 4750.

CONCLUSION

For the foregoing reasons, we respectfully request that the Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit be granted.

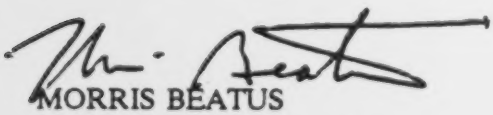
DATED: August 2, 1993

DANIEL E. LUNGREN, Attorney General
of the State of California

GEORGE WILLIAMSON
Chief Assistant Attorney General

RONALD A. BASS
Senior Assistant Attorney General

GERALD A. ENGLER
Deputy Attorney General



MORRIS BEATUS
Deputy Attorney General
[Counsel of Record]

Attorneys for Petitioner

APPENDIX A

FILED MAY 5, 1991
NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ALLEN R. TURK,

Plaintiff-Appellant,

v.

ALAMEDA COUNTY;
ROBERT G. BORG, Warden,
California, Folsom State Prison,

Defendants-Appellees.

No. 92-15535
D.C. No.
CV 90-00079 VRW
MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Vaughn R. Walker, District Judge, Presiding
Submitted December 17, 1992**
San Francisco, California

Before: NORRIS, BEEZER, and KLEINFELD, Circuit Judges

Allen Turk appeals pro se from the district court's

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a) and Ninth Circuit Rule 34-4.

denial of his habeas petition. In 1981, Turk was convicted of second degree murder, use of a deadly weapon, and violation of parole. In his habeas petition, Turk argues that (1) the trial court denied him due process by failing to hold a hearing to determine whether he was competent to stand trial; and (2) his counsel rendered ineffective assistance by failing to raise the competency issue on appeal. We reverse and remand.

We review a trial court's denial of a competency hearing to see whether the evidence raised a bona fide doubt as to the defendant's competency to stand trial. "On appeal, we inquire 'whether a reasonable judge...should have experienced doubt with respect to competency to stand trial.'" Hernandez v. Ylst, 930 F.2d 714, 716 (9th Cir. 1991) (quoting de Kaplany v. Enomoto, 540 F.2d 975, 983 (9th Cir. 1976) (en banc), cert. denied, 429 U.S. 1075 (1977)).[1/] The test is not whether the trial judge did in fact experience doubt, but whether he or she should have experienced doubt. See Hernandez, 930 F.2d at 716 ("'The test is an objective one.'" (quoting Pedrero v. Wainwright, 590 F.2d 1383, 1388 (5th Cir.) (Wisdom, J.), cert. denied, 444 U.S. 943 (1979)).

Here, there was sufficient evidence to create a bona fide doubt as to the defendant's competence to stand trial.

First, Turk's counsel believed that Turk was incompetent to stand trial. Defense attorney Comiskey

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1. Cf. United States v. Lewis, No. 92-50384, slip op. at 3541 (9th Cir. Apr. 9, 1993) ("A court reviewing a record for evidence of a defendant's competence in a prior proceeding must determine 'whether evidence of incompetence was such that a reasonable judge would be expected to experience a genuine doubt respecting the defendant's competence.'" (citation omitted)).

moved to have a competency hearing under California Penal Code § 1368 on August 25, 1981. Defense attorney Murray made a second § 1368 motion the following day. A defense attorney's opinion about his or her client's competence to stand trial carries weight. Hernandez, 930 F.2d at 718 ("While the opinion of [defendant's] counsel certainly is not determinative, a defendant's counsel is in the best position to evaluate a client's comprehension of the proceedings."). Defense attorney Comiskey explained that his client had delusions of a "religious nature." Red at 6.

Second, Turk was prone to "psychotic episodes." As the trial judge said:

> [A]s I listen to him, I honestly feel that he is competent to proceed with this trial. I have no doubt about it. I mean, he may have, for example, what you call a psychotic episode, may fade in and ... out.

2 RT 271.

Third, petitioner's counsel reported to the court on August 26, 1981, that Dr. Sheila Bastian, a psychologist, had interviewed the petitioner and found him "psychotic at the time she was interviewing him." Red at 7; 2 RT 278. Dr. Bastian had examined the petitioner that morning. Dr. Bastian later appeared before the court and testified that she suspected that petitioner had "organic brain syndrome," possibly associated with "at least five head injuries." Red at 9; 2 RT 494.

Fourth, petitioner had a long history of

psychological problems for which he had been committed to mental hospitals on approximately 10 occasions. The last hospitalization appears to have taken place in 1974, about seven years before the trial. Dr. Bastian testified that she had a medical history file with "almost forty doctors' reports in it," with "ninety-eight percent" of the reports concluding that petitioner was a paranoid schizophrenic. Red at 9; 2 RT 484. These reports were apparently made during the time petitioner was hospitalized.

Finally, petitioner suffered a head injury just a few days before the start of the trial.

All these facts taken together established a bona fide doubt as to the defendant's competency to stand trial.

To support its argument that no hearing was necessary, the government relies on the testimony of Drs. Burstein and Gudiksen, who testified before the court on the petitioner's mental defenses. Dr. Burstein, a psychologist, testified that records of petitioner's psychiatric history showed that no one had diagnosed petitioner as schizophrenic after 1974. He also opined that the many doctors who had, before 1975, diagnosed petitioner as being schizophrenic were wrong in making that diagnosis. Dr. Gudiksen, a psychiatrist, testified that petitioner did not suffer from paranoid schizophrenia at the time she examined him or at the time of the crime. Instead, she believed that petitioner had an "anti-social personality disorder" without "organic brain syndrome." Red at 10-11. This evidence did not, however, erase the doubt that the other evidence had created about petitioner's competence to stand trial.

Because petitioner's trial took place more than a

decade ago, a retrospective determination of petitioner's competency at that trial is no longer possible. We therefore vacate petitioner's convictions. The state is free to retry the petitioner, "assuming, of course, that at the time of such trial he is competent to be tried." Drope v. Missouri, 420 U.S. 162, 183 (1975).[2/]

REVERSED and **REMANDED** with instructions to grant the petition for a writ of habeas corpus.

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2. Because we grant the habeas petition on due process grounds, we do not reach the ineffective assistance of counsel claim.

Turk v. Alameda, No. 92-15535
Kleinfeld, J., dissenting:

I respectfully dissent.

The federal habeas corpus statutory standard at 28 U.S.C. § 2254(d)(8) controls our review of the state court's determination that no competency hearing was needed. Maggio v. Fulford, 462 U.S. 111, 117 (1983). The statute requires us to accord a "presumption of correctness" to the state court's determination. See Evans v. Raines, 800 F.2d 884, 886 (9th Cir. 1986). The determination that no competency hearing was required is factual, and we cannot overturn it if it was "fairly supported by the record."' Maggio v. Fulford, 462 U.S. 111, 117 (1983) quoting 28 U.S.C. § 2254(d)(8). We cannot substitute our judgment as to the credibility of evidence for that of the state court. Id. at 113.

The majority has not discussed application of Maggio, relying instead upon our subsequent decisions in Hernandez v. Ylst, 930 F.2d 714, 716 (9th Cir. 1991), and United States v. Lewis, No. 92-50384 (9th Cir. 1993.) Neither of these cases cites or discusses Maggio, so they cannot be treated as circuit decisions interpreting the Supreme Court decision. If they were precedent on the question presented, then we would be required to follow them. United States v. Mandel, 914 F.2d 1215, 1221 (9th Cir. 1991). But they are not, because the question of standard of review was not at issue and applicability of Maggio was not considered in those cases. We must therefore follow Maggio. Cross v. Bruning, 413 F.2d 678, 680 (9th Cir.), cert. denied, 396 U.S. 970 (1969). The

only Ninth Circuit case citing Maggio is Evans v. Raines, 800 F.2d 884, 887 (9th Cir. 1986), which applies the rule that determinations of competency are entitled to a presumption of correctness.

The majority correctly articulates the substantive test as whether a reasonable judge should have experienced doubt as to Turk's competency. Under Maggio, we must accord a presumption of correctness to the state court determination to the contrary, and uphold it if it was fairly supported by the record. Applying this deferential standard, I do not think we can set aside the state court determination.

Turk was charged with and convicted of murder, for beating a woman to death. Turk's defense was to be that because of his diminished capacity, he was only capable of manslaughter. Midway through trial, Turk told his lawyer that he did not want to use the diminished capacity defense. Turk's lawyer then requested a competency hearing. Turk's lawyer said that because Turk could not distinguish between legal and spiritual guilt, Turk would not accede to his counsel's suggestion that he offer diminished capacity as a defense.

The state judge reviewed reports on Turk's mental health written by three different specialists. One psychologist reported that Turk had brain damage and was psychotic, but two other experts contradicted this opinion. One psychiatrist found that although Turk had been schizophrenic, his disease was in remission, and the other diagnosed Turk as having an anti-social personality disorder, but not schizophrenic.

The state trial judge engaged Turk in a colloquy. Turk told the judge, "Well, I just, you know, I'd rather go

to trial as it is right now without anyone coming, any expert witness. What I didn't want was N.G.I., the defense for diminished capacity. I don't want to deal with that." He also told the judge, "I want to go straight into this trial as it is. I want to withdraw the plea of not guilty by reason of insanity, N.G.I., and I don't want the matter of diminished capacity." Unlike us, the state judge observed Turk as Turk spoke, and observed Turk throughout a twenty day trial. The judge concluded, based on his observation of Turk and his colloquy with him, the psychiatric reports, and counsel's recommendation, all considered in light of the judge's own extensive experience presiding in psychiatric court, that "as I listen to him, I honestly feel he is competent to proceed with this trial -- I have no doubt about it," and "as I talked to the defendant, I feel that he has the ability to proceed."

Those are the critical findings. The record fairly supports them. Turk's own statements show reasoned analysis and judgment about how he wished to proceed, and evinced his understanding of the proceedings and his ability to make decisions based upon realistic perception of the alternatives. The colloquy, along with the trial judge's other extensive observation of Turk and two of the psychiatric reports, afforded a substantial evidentiary basis to the state trial judge for his determination that there was no bona fide doubt as to Turk's competency to stand trial.

If we were permitted to substitute our judgment de novo, we might conclude that the report of brain damage and psychosis required a hearing. But we may not, under Maggio, accord so little deference to a state court

determination. We should therefore affirm.

APPENDIX B

FILED JUNE 24, 1993
NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALLEN R. TURK,

Plaintiff-Appellant,

v.

ALAMEDA COUNTY;
ROBERT G. BORG,
Warden, California, Folsom State Prison,

Defendants-Appellants.

No. 92-15535
D.C. No.
CV 90-00079VRW

ORDER

Before: NORRIS, BEEZER, and KLEINFELD, Circuit Judges

The panel, as constituted above, has voted unanimously to reject the suggestion for a rehearing en banc.

Judges Norris and Beezer voted to deny the petition for rehearing, and Judge Kleinfeld would grant it.

The full court has been advised of the suggestion for en banc rehearing and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is **DENIED**, and the suggestion for a rehearing en banc is **REJECTED**.

APPENDIX C

FILED: FEBRUARY 27, 1992

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

ALLEN R. TURK,

Petitioner,

v.

ROBERT BORG, Warden, Folsom State Prison; PEOPLE OF THE STATE OF CALIFORNIA; ALAMEDA COUNTY SUPERIOR COURT;

Respondents.

No. C90-0079-VRW

ORDER

ENTERED IN CIVIL DOCKET FEB 27, 1992

Petitioner, a prisoner at California's New Folsom State prison, filed a petition for writ of habeas corpus. In a preliminary order dated March 26, 1991, the court found that the petition stated a claim for relief on the grounds that the state failed to afford him an evidentiary hearing regarding his competence to stand trial and that he may have been denied effective assistance of counsel. An order to show cause issued which the state answered and to which petitioner filed a traverse.

Having now considered the record, applicable law and the parties' submissions, the court concludes that there is no genuine issue of material fact and no merit to petitioner's claims.

Petitioner was convicted of murder. After clearly and unequivocally submitting himself to trial without asserting a diminished capacity defense, and after questioning by the trial court about petitioner's understanding of the consequences of his decision and his capability to make this decision and to stand trial and assist in his defense, and after the trial court's examination of petitioner and his counsel, and after being afforded a trial in which his mental state was in issue, petitioner now contends that the trial court should have suspended the trial and conducted a proceeding under Cal. Penal Code section 1368. The issue here is whether the trial court denied a request for competency hearing on the basis of fairly supported factual conclusions. The trial court correctly decided that there was no substantial evidence to warrant reasonable doubt about petitioner's competency to stand trial. Petitioner was deprived of no constitutional right.

Petitioner's claim for ineffective assistance of appellate counsel is similarly without merit. Appellate counsel need not - and manifestly should not - raise every conceivable issue. Counsel's work was objectively reasonable and there is no probability that had counsel challenged the trial court's decision to deny the competency hearing petitioner would have prevailed on appeal.

The petition is **DENIED** and order to show cause discharged.

IT IS SO ORDERED.

DATED: February 27, 1992

VAUGHN R. WALKER
United States District Judge

APPENDIX D

FILED APR 20 1984
NOT TO BE PUBLISHED
IN OFFICIAL REPORTS

THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION THREE

THE PEOPLE OF THE
STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

ALLEN ROY TURK,

Defendant and Appellant.

A012701
(Super.Ct.No. 71151)

Appellant Roy Allen Turk was convicted by a jury of first degree murder. The trial court denied his new trial motion, but reduced the offense to second degree murder. Appellant contends that (1) the trial court erred when it denied his mid-trial motion for substitution of counsel; and (2) the prosecutor committed prejudicial misconduct. We affirm the judgment.

We need not recite the facts in any detail. Juanita Whitaker died as a result of severe head injuries; her body was found near appellant's truck. Appellant told at least two acquaintances that he had beaten a woman and thought he killed her.

Prior to the commencement of trial, appellant pleaded not guilty by reason of insanity. In his opening

statement, one of appellant's two attorneys[1/] told the jury that the evidence would show that what had occurred was only a manslaughter, because of appellant's mental illness and alcohol and drug use. However, on the eighth day of the trial, after the prosecution had presented its case, and after four defense witnesses had testified, appellant's attorneys informed the court that contrary to their advice, appellant did not want any psychologists to testify. Appellant now contends that what had occurred was a breakdown in the attorney-client relationship of such magnitude as to jeopardize his right to effective assistance of counsel. Appellant contends that the court failed to conduct an inquiry into the severity of the breakdown, and that it erred in denying his motion for substitution of counsel.

First, appellant's contention that the trial court did not inquire about his dissatisfaction with counsel is incorrect. The court gave appellant ample opportunity to explain his disagreements with counsel, and questioned him carefully in an attempt to determine why he was dissatisfied and what he wanted to do.

Moreover, contrary to appellant's current assertion, it was not clear what he was requesting at trial. For example, he stated at one point that his only request was to "withdrew all physicians." Later, he reiterated that the only problem he had with his attorneys was that he wanted to withdraw his "plea of N.G.I. and diminished

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1. Appellant does not dispute respondent's statement that the attorneys were privately retained, not appointed.

capacity." After additional questioning eliciting that he would rather have his attorneys withdraw than permit them to go on with the diminished capacity defense, he stated ambiguously, "And I still seek further counsel or either I will do it myself."

The court viewed appellant's motion at least in part as an untimely request to represent himself. When a defendant moves during a trial to represent himself, the court is not required to grant that motion. Rather, it must inquire into the factors underlying the request, in order to create an adequate record for possible appellate review. (People v. Joseph (1983) 34 Cal.3d 936, 944, fn. 2.) It should consider factors such as the reasons for the request, the quality of counsel's representation, the length and stage of the proceedings, and the disruption or delay which might reasonably be expected to follow the granting of such a motion. Thereafter, whether to grant or deny the motion is a matter for the trial court's discretion. (People v. Windham (1977) 19 Cal.3d 121, 128-129; cf. People v. Joseph, supra, 34 Cal.3d at pp. 943-948 [timely pretrial motion to represent self must be granted provided defendant has mental capacity to waive right to counsel with realization of probable risks and consequences].)

Here the trial court heard appellant explain that he did not like the diminished capacity defense. However, the court also assessed counsel's representation of appellant, and concluded that given the evidence, they would be subject to criticism as ineffective if they did not present a diminished capacity defense. The trial was in its eighth day, and appellant had not raised any previous objections, even when his attorney informed the jury in his opening statement of the thrust of the defense. If

what appellant wanted was to represent himself, he has failed to establish any abuse of discretion in the denial of that untimely request.

If what appellant wanted was a substitution of counsel, it is settled that a trial court has discretion to deny a motion for a continuance to secure new counsel if the motion is made during trial. (People v. Molina (1977) 74 Cal.App.3d 544, 549.) Whether a motion to relieve counsel should be granted depends on whether failure to grant the motion would substantially impair or deny the right to assistance of counsel. (People v. Joseph, supra, 34 Cal.3d at p. 944, fn. 3.) Here it is apparent that appellant's right to assistance of counsel was not impaired and appellant has failed to establish any abuse of discretion.

The cases relied on by appellant are inapposite. United States v. Williams (1979) 594 F.2d 1258 involved a motion for substitution of counsel made approximately a month before trial, not a midtrial motion such as appellant's. (Id., at pp. 1259-1261.) Similarly, in Brown v. Craven (1970) 424 F.2d 1166, defendant made four separate pretrial motions for a new attorney, and defense counsel also informed the court of his client's dissatisfaction with his representation prior to the commencement of trial. (Id., at pp. 1169-1170, fn. 3.) People v. Stankewitz (1982) 32 Cal.3d 80 is similar to this case only in that a disagreement arose between defendant and his lawyer, who believed that defendant's position was the irrational result of a mental condition. Unlike appellant's case, however, the disagreement in Stankewitz arose prior to trial; the issue was whether the trial court properly refused either to order a hearing on defendant's

competency to stand trial or to grant a request for substitution of counsel despite substantial psychiatric evidence that while defendant was unable to assist his public defender in a rational manner, he might be able to cooperate with another lawyer. (Id., at pp. 91-94.)

Appellant also contends that the prosecutor committed prejudicial misconduct during cross-examination of Drs. Bastien and Davis, and during closing argument.

First, appellant made no objection at trial to two of the closing argument statements and one of the questions which he now cites as misconduct. Without deciding whether the remarks and question constituted misconduct, we conclude that a timely objection and admonition would have cured any harm flowing therefrom; accordingly, they may not be challenged for the first time on appeal. (People v. Green (1980) 27 Cal.3d 1, 34-35.)

Appellant contends that contrary to the court's ruling that there be no mention of his having been found not guilty by reason of insanity of murder in 1972, the prosecutor referred to a statement appellant made to a psychiatrist in 1970 about cutting a devil's throat. However, the record refutes appellant's contention. The prosecutor did not violate the court's ruling; on the contrary, prior to mentioning the statement, the prosecutor consulted with the court, which expressly ruled that the statement was admissible.

Appellant argues that a portion of the prosecutor's closing argument was misconduct because it suggested that defense counsel had made up the defense (i.e., referring to psychiatric testimony as a "song and dance" or "bag of tricks"). We disagree with appellant's characterization of these remarks. While they unquestionably indicated

skepticism as to the reasonableness of the experts' conclusions about appellant's mental state, they did not suggest that defense counsel had fabricated the diminished capacity defense. (Cf. People v. Bain (1971) 5 Cal.3d 839, 845-847.)

As for the remaining cross-examination which was objected to at trial, our review of the record persuades us that appellant has exaggerated the effect of these questions. Even if we assume arguendo that each was misconduct, their cumulative effect was undoubtedly harmless beyond a reasonable doubt, and no miscarriage of justice has occurred. (See People v. Green, supra, 27 Cal.3d at p. 35; People v. Bolton (1979) 23 Cal.3d 208, 214-215; cf. People v. Hudson (1981) 126 Cal.App.3d 733, 735-742.)

Judgment is affirmed.

Scott, J.

We concur:

White, P.J.

Barry-Deal, J.

APPENDIX E

DEPT. 11

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ALAMEDA

Date: May 2, 1988 Hon. GORDON BARANCO, Judge
Rhoda N Payne, Deputy Clerk
Deputy Sheriff Not Reported, Reporter

THE PEOPLE OF THE
STATE OF CALIFORNIA

Plaintiff

Counsel appearing for
Plaintiff None

vs.

ALLEN R. TURK

Counsel appearing for
Defendant None

Defendant

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NATURE OF PROCEEDINGS: PETITION FOR WRIT OF HABEAS CORPUS ACTION No. 71151

PFN _____

CDC _____

Placed on calendar - EX PARTE

Said matter is placed on calendar this date by order of the Court.

The Court having read and considered the Petitioner's Petition for Writ of Habeas

Corpus filed on March 24, 1988, the Court hereby orders said Petition

[ ] granted. [X] denied for the following reason(s):

no prima facie showing. Writ of Error Corum Nobis denied. Petitioner has not shown the requisite "new facts" for the issuance of such writ. Further, the petition for Corum Nobis has not been brought within a reasonable time after judgment was rendered. Request for appointment of counsel may be made directly to the State Public Defender.

Copy of this minute order mailed to the following:

Allen R. Turk C-38102
P.O. Box 29
Represa, Ca. 95671

by _____
Rhoda Nishiyama-Payne, Deputy Clerk

APPENDIX F

FILED JUL 27, 1989
IN THE COURT OF APPEAL OF

THE STATE OF CALIFORNIA

FOR THE

FIRST APPELLATE DISTRICT

DIVISION THREE

In re ALLEN R. TURK

on Habeas Corpus.

A044327

BY THE COURT:

Petition for writ of habeas corpus is denied. (White, P.J., Merrill, J. and Strankman, J. participated in the decision).

Dated JUL 27 1989

Clinton White P.J.

APPENDIX G

FILED JANUARY 3, 1990

ORDER DENYING WRIT
OF HABEAS CORPUS
No. SO12334

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

IN RE ALLEN TURK

ON

HABEAS CORPUS

Petition for writ of habeas corpus DENIED.

Lucas
Chief Justice

CERTIFICATE OF SERVICE BY MAIL

ROBERT G. BORG, WARDEN,

Petitioner,

v. No._____

ALLEN R. TURK,

Respondent.

MORRIS BEATUS, a member of the Bar of the Supreme Court of the United States, states:

That his business address is 455 Golden Gate Avenue, Suite 6200, in the City and County of San Francisco, State of California; that on August 2, 1993, he served a true copy of the attached Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit in the above-entitled matter on petitioner by placing same in envelope addressed as follows:

Honorable John J. Meehan
District Attorney
County of Alameda
1225 Fallon Street, Rm 900
Oakland, Ca 94612
ATTN: Ken Burr

Allen R. Turk
C-38102
P.O. Box 29
Represa, Ca 95671

Said envelope was then sealed and deposited in the United States Mail at San Francisco, California, with the postage thereon fully prepaid.

MORRIS BEATUS
Deputy Attorney General